No. 475.

By. of May & Doe for Appt.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 475.

GERHARD TERLINDEN, *Appellant,*

vs.

JOHN C. AMES, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS, *Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLANT.

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ATTORNEYS FOR APPELLANT.

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Supreme Court of the United States.

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GERHARD TERLINDEN, *Appellant,*

vs.

JOHN C. AMES, United States Marshal for the Northern District of Illinois, *Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois.

Brief for Appellant.

STATEMENT OF THE CASE.

This is an appeal from the final judgment of the District Court for the Northern District of Illinois, dismissing the writ of *habeas corpus* and remanding appellant to the custody of the marshal for said district.

Appellant was arrested at the City of Milwaukee, Wisconsin, August 16, 1901, upon a warrant issued by Mark A. Foote, Esq., United States Commissioner, charging him with having committed within the jurisdiction of the German Empire, the crime of forgery. He was taken before said commissioner and the proceedings were then continued from time to time until the 26th day of September, 1901, when the original complaint and warrant were dismissed and appellant rearrested upon a new warrant, on substantially the same charge. The amended or new complaint, upon which this new war-

rant was predicated, besides detailed allegations of the alleged forgeries, contained copies of the warrant of arrest issued by the German court, of the provisions of the penal code of the German Empire applicable to the crimes charged and of all of the depositions of witnesses taken in said Empire in said matter, said copies being specifically referred to and described in said complaint and filed therewith, in effect as exhibits. The proceedings before said commissioner were again continued to the 16th day of October and on that day to the 28th day of October, 1901.

On the 18th day of October, 1901, appellant sued out a writ of *habeas corpus* on a petition alleging, in substance, that he was illegally restrained because no extradition treaty existed between the government of the United States and the German Empire, because the treaty of 1852 with Prussia and other German states was terminated by the formation of the German Empire; moreover, even if said treaty was not terminated, the complaint alleged no extraditable offense, and the testimony filed with said commissioner failed to show the commission of an extraditable offense, and the commissioner had no jurisdiction, under the provisions of the statutes and the treaty of 1852, if still in force, of the person of the appellant.

The writ was made returnable October 21, 1901, when the marshal filed his return, seeking to justify the detention under the warrant of commitment issued by the commissioner. To this return appellant filed his traverse, alleging facts material to the case and denying the justification under said commitment, attaching to said traverse and making the same a part thereof, copies of the depositions taken in Germany, of the pertinent provisions

of the criminal code of the German Empire and also of the civil code, these allegations showing, or tending to show, that appellant had committed no extraditable offense under any circumstances.

Appellant then asked leave to introduce testimony as to the legality of his restraint, and the court being in doubt as to whether such testimony could be received, directed counsel to submit briefs and continued the hearing to October 28, 1901. Briefs were submitted and on October 29th, the court declined to receive testimony and held that the question of the legality or illegality of appellant's detention must be determined from the records before the commissioner. Appellant then filed a petition for a writ of *certiorari* in aid of said writ of *habeas corpus*, for the purpose of bringing the record before the commissioner, before the court and on October 31st this petition was denied. The court then ordered counsel to file briefs on the questions raised by the petition for the writ of *habeas corpus* and took the matter under advisement until November 5, 1901, when the final judgment dismissing the writ and remanding appellant to the custody of the marshal, was entered.

From this final judgment appellant has prosecuted this appeal directly to this court because among the questions raised in his petition for the writ of *habeas corpus*, was included the question of the construction and validity of a treaty.

Specification of Errors.

Appellant assigns his specifications of errors committed by said District Court in thus dismissing his petition and remanding him to the custody of the marshal, as follows, in the order in which we intend to argue them:

First.

THAT THE COURT ERRED IN HOLDING THAT THE QUESTION OF THE EXISTENCE OF A TREATY MUST BE DETERMINED BY THE POLITICAL DEPARTMENT OF OUR GOVERNMENT AND WAS NOT WITHIN THE PROVINCE OF THE COURT TO DECIDE.

Second.

THAT THE COURT ERRED IN DECLINING TO HOLD THAT NO TREATY EXISTED BETWEEN THE UNITED STATES ON THE ONE PART AND THE KINGDOM OF PRUSSIA OR THE GERMAN EMPIRE ON THE OTHER.

Third.

THAT THE COURT ERRED IN DISCHARGING THE WRIT OF HABEAS CORPUS, THEREBY HOLDING THAT A TREATY OF EXTRADITION EXISTED BETWEEN THE UNITED STATES OF AMERICA ON THE ONE PART AND THE KINGDOM OF PRUSSIA OR THE GERMAN EMPIRE ON THE OTHER.

Fourth.

THAT THE COURT ERRED IN DECLINING TO HEAR EVIDENCE FOR THE PURPOSE OF SHOWING THAT NO EXTRADITABLE OFFENSE HAD BEEN COMMITTED.

Fifth.

THAT THE COURT ERRED IN DENYING THE PRAYER FOR A WRIT OF CERTIORARI IN AID OF SAID WRIT OF HABEAS CORPUS THERETOFORE ISSUED, FOR THE PURPOSE OF BRINGING THE RECORD FROM THE UNITED STATES COMMISSIONER TO THE DISTRICT COURT.

Sixth.

THAT THE COURT ERRED IN HOLDING THAT THE RECORD BEFORE THE COURT SHOWED THE COMMISSION OF AN EXTRADITABLE OFFENSE.

ARGUMENT.

MAY IT PLEASE THE COURT:

Before discussing the assignments of error just cited, we desire to invoke that principle of international law which holds that every person who comes into the territory of a nation immediately comes under its protection and partakes of the inviolability of the soil upon which he stands. He is no longer subject to the law of the country which he has left, nor can he be required to answer to it, except by the consent of the nation to whose laws he has made himself subject by coming within its territory.

Hawley International Extradition, 1.
Wharton Conflict of Laws, Section 17.

It has been held that aliens are entitled to the benefit of the fourteenth amendment of the Constitution of the United States.

In re Ah Tong, 3 Sawy. (U. S.), 144.
Ah Kow v. *Nunan*, 5 Sawy. (U. S.), 560.
In re Ah Ching, 2 Fed. Rep., 733.

It follows, therefore, that appellant cannot be removed from the territory of the United States, except by due process of law, that is, in accordance with the provisions of the extradition treaty, if one exists, and the statutes made and provided in relation thereto.

It can make no difference for what reason a person comes within the territory of a nation, when once there, he is entitled to its protection until good and legal cause is shown why such protection should be denied him.

First.

THE QUESTION OF THE CONSTRUCTION OR VALIDITY OF A TREATY IS A JUDICIAL QUESTION AND NOT A POLITICAL ONE.

The District Court held that it could not determine the question whether an extradition treaty existed, under the provision of which appellant might be extradited, because such question was exclusively within the province of the political department of the government to decide. We contend that this proposition is untenable. Section 2, Article III, of the Constitution of the United States, provides:

"The judicial power shall extend to all cases in law and in equity arising under this constitution, the laws of the United States and treaties made, or which shall be made, under their authority."

Likewise, Section 8 of the act of March 3, 1891, which act created the Circuit Court of Appeals, provides that the proper judicial department of the government shall have power to determine the constitutionality of any law of the United States or the *validity or construction of any treaty made under its authority* WHEN DRAWN IN QUESTION. Thus the legislative department has clearly given the judiciary the power and jurisdiction to construe, and decide the validity of, treaties.

Those who helped frame our constitution and the early expounders of that instrument, held that the construction of a treaty was a judicial function. Thus:

> "The treaties of the United States, to have any force at all, must be considered as a part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determination."
>
> The Federalist, No. 22.

In a very early case a Circuit Court held that the validity of a treaty admitted of two descriptions, to wit: necessary validity and voluntary validity. By necessary validity of a treaty was meant those questions affecting the proper execution of a treaty, its purpose, construction and legal force and effect. By voluntary validity was meant those questions arising from the violations of the provisions of the treaty by one of the contracting parties, in which case the other contracting party could at its option, abrogate or annul the treaty, or enforce its provisions in the proper tribunal.

Jones v. *Walker*, 2 Paine's C. C. Rep., 688.
Wharton's International Law, Sec. 133.

Clearly, the necessary validity of a treaty is a question for the courts to determine while the voluntary validity is left for decision to the political department of the government.

It is true that political questions are pre-eminently the function of the political department of the government, and such questions when so determined are not otherwise decided by the courts.

Doe v. *Braden*, 16 How., 635.
Foster v. *Neilson*, 2 Peters, 314.

But the construction of treaties, including questions as to their validity and existence, is a question for the courts to determine.

Wilson v. *Wall*, 6 Wallace, 83.
U. S. v. *Rauscher*, 119 U. S., 407.
Benson v. *McMahon*, 127 U. S., 457.
In re Metzger, 1 Parker Crim. Rep., 108.

This court has time and again construed, interpreted and determined the validity of treaties. We cite some of the cases:

The Amicable Isabella, 6 Wheaton, 1.
The Nerida, 9 Cranch., 388.
Harcourt v. *Guillard*, 12 Wheaton, 523.
U. S. v. *Arredondo*, 6 Peters, 691.
City of New Orleans v. *Armas*, 9 Peters, 224.
The Amistad, 15 Peters, 518.
Storther v. *Lucas*, 12 Peters, 410.
U. S. v. *D'Auterive*, 10 Howard, 609.
Haucnstein v. *Lynham*, 100 U. S., 483.
U. S. v. *Rauscher*, 119 U. S., 407.

The question here urged upon the consideration of the court does not involve the principles of the abrogation of a treaty. We do not contend that the treaty in question was repealed or annulled by any positive act of either nation. Neither do we claim that either party has violated its provisions so that it might be considered abrogated at the option of the other party; but our contention is that the treaty in question has been dissolved, terminated by operation of law, in this case, by operation of international law. Since extradition treaties are personal executory contracts, as we shall show presently, it must follow that questions affecting the validity of those contracts and their existence under the law, are questions to be determined by the courts.

Furthermore, under the constitution treaties as well as the constitution and laws of the United States are the Supreme law of the land.

Art. VI, Constitution.

Consequently, treaties are on the same plane with provisions of the constitution and acts of Congress.

Whitney v. *Robertson*, 124 U. S., 190.
Botiller v. *Dominguez*, 130 U. S., 239.

Althought courts cannot pass on the policy of any legislative act, yet it is clearly within their function and power to determine, when such act is challenged, whether the law is a valid law, its meaning and effect and whether it has been repealed under certain circumstances. Likewise, in case of treaties, courts cannot determine what treaties are to be made and with whom they ought to be concluded, what are to be considered violations as between the parties thereto and what the remedy in case of violation by either party, but their construction and necessary validity and their termination or repeal under certain conditions, are questions of law, we submit, to be determined by the Courts of the land.

As already intimated, the question of the existence of the treaty under discussion, must be decided in accordance with the principles of international law. International law is a part of the law of the land and must be ascertained and administered by the courts whenever such questions are duly submitted to their determination.

Hilton v. *Guyot*, 159 U. S., 113.
The Paquette, Habana, 175 U. S., 677.

It has been held that acts of Congress ought to be construed with reference to the law of nations.

Murray v. *Schooner Charming Betsy*, 2 Cranch., 64.

If acts of Congress, why not treaties? The application of the principles of international law to determine the validity of a particular treaty, is the function of the judiciary.

Our contention on this branch of the case is respectfully submitted under the following propositions:

The construction, validity and existence of a treaty must be determined by the courts, because:

First. The duty is so imposed by the Constitution and acts of Congress.

Second. The courts have repeatedly done so, whenever called upon to act, on proper case presented.

Third. Treaties are part of the law of the land and are governed, in this respect, by the same rules that govern provisions of the Constitution and acts of Congress.

Fourth. The principles of international law must be applied in construing treaties, as well as other provisions of the law of the land and the question here raised must be determined by the application of those principles to the treaty under consideration.

Second and Third.

NO EXTRADITION TREATY EXISTS BETWEEN THE UNITED STATES AND THE DEMANDING COUNTRY UNDER THE PROVISIONS OF WHICH APPELLANT CAN BE SURRENDERED.

We shall discuss these two specifications of error together, because they involve the same question.

In seeking to establish our contention in this connection, we submit the following propositions to the consideration of this Court:

a.

A treaty must exist or appellant cannot be extradited under any circumstances.

b.

Extradition is an international act and is governed exclusively by the rules that obtain as to the conduct of nations in their intercourse with each other.

c.

The nature and characteristics of treaties generally and of extradition treaties in particular, are important considerations, in this connection.

d.

It is admitted that no extradition treaty exists between the United States and the German Empire.

e.

The present status of Prussia and the other German states is determined, to a great extent, by the Constitution of the German Empire.

f.

The present status of Prussia is finally determined by the principles of international law.

g.

The action of the United States in regard to other treaties with nations who lost their identity is instructive in this connection.

h.

The objections to our contention, when scrutinized and analyzed, will be found to be untenable both on principle and under the authorities.

i.

Even if the treaty of 1852 was not terminated, *ipso facto*, by the formation of the German Empire, yet extradition under its provisions is now legally impossible.

It must be admitted that the treaty relations between the United States and the German Empire, as far as extradition is concerned, are anomalous. No similar situation is presented in any other branch of our international intercourse. We contend that the continuance of this situation cannot be justified under any construction of international law and our own Constitution and statutes.

a.

The necessity of a treaty in order that extradition may be considered.

Our statutes provide that *"whenever there is a treaty or convention for extradition between the government of the United States and any foreign government,"* then certain judicial officers are authorized to entertain a complaint and issue a warrant to apprehend the alleged fugitive and examine into his criminality.

Section 5270, Revised Statutes.

This is a provision of the law of the land and the legislative branch of the government has determined that a treaty or convention for extradition shall exist before any demand for the surrender of an alleged fugitive can be considered at all.

There can be no extradition on principles of comity. Our government and our courts do not recognize such principle now. In the absence of a treaty, there is no law which authorizes the president to deliver up any one found in the United States, who is charged with having committed an offense against the laws of a foreign country.

Holmes v. *Jennison*, 14 Peters, 540.
Matter of Metzger, 5 Howard, 176.
U. S. v. *Rauscher*, 119 U. S., 407.
Wharton's Private Inter. Law, Sec. 835.
Wheaton's Int. Law (Boyd), Sec. 115.
Wharton's Int. Law Digest, Sec. 268.
Hawley International Extradition, 2

It is true that some authorities, both courts of other countries and writers on international law, hold that extradition should be granted as a matter of comity. But in the United States this doctrine has not been recognized and was denied in the first case of this kind that came to the attention of the court.

Republica v. *DeLongchamps*, 1 Dallas, 110.

The doctrine that without a treaty there can be no extradition has been steadily and uniformly maintained and the political department of our government has adopted the same policy.

Jefferson to Ghent, 1 Am. St. Pap., 177.
J. C. B. Davis to Delfosse, For. Rel., 1873.
Bayard to Davis, 1886, Mss. Dom. Let.
Cushing, Op. 85, 1853.

Consequently the existence of a treaty between this government and the demanding government must be es-

tablished or the extradition of appellant cannot even be considered.

b.

Extradition is an international act and can be consummated only between independent nations.

Extradition belongs exclusively to the foreign intercourse between sovereign nations and in such intercourse dependent states cannot be recognized. The treaty under which appellee seeks to justify the restraint of appellant is the treaty concluded with Prussia and other Germanic states in 1852, and in order to succeed in establishing such justification it must be shown not only that Prussia was an independent, sovereign nation at that time, but is such at this time, a governmental entity, recognized by international law as one of the family of nations. As we shall show presently, Prussia is now a dependent state, having none of the incidents of sovereignty, and has lost her identity as a nation.

> "Extradition of a fugitive from justice is essentially a national act. * * * Nations in their intercourse with one another do not recognize any local territorial divisions or deal with any authority except the supreme or sovereign government."
>
> Hawley International Extradition, 1.

Extradition is a proceeding by which one *sovereign* government whose laws have been violated by a person who thereafter flees from justice, demands, and the government to which he flees, surrenders, the fugitive to be tried for the offense.

> Anderson's Law Dict., 438.
> Bouvier's Law Dict., 637.
> Rapalje and Lawrence, Law Dict., 491.
> 1 Moore on Extradition, Section 1.

It has been held that "the rights and duties of nations towards each other relative to fugitives from justice, *are a part of the law of nations*, and have always been treated as such by the writers upon public law."

Chief Justice Taney in *Holmes* v. *Jennison*, 14 Peters, 569.

In a later case this court held that the power sought to be exercised by the governor of Vermont in seeking to surrender Holmes to a foreign nation, which power was discussed in the case just cited, "*is a part of the foreign intercourse of this country* which has undoubtedly been conferred upon the federal government, and it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers."

U. S. v. *Rauscher*, 119 U. S., 407.

This doctrine that extradition is a matter of foreign intercourse between nations, has also been held by State Courts.

People v. *Curtis*, 50 N. Y., 326.
People v. *Supervisors*, 134 N. Y., 9.

From these authorities it is clear that the question of surrendering a fugitive can be considered only between powers that are sovereign and independent. If the demand in the case at bar is made by a state having no power to make treaties, appoint and receive ambassadors and other public ministers, or if the demand is made by a state having such powers but no treaty with this government on this subject, then extradition of appellant is impossible.

c.

The nature and characteristic of treaties generally and of extradition treaties in particular.

Text writers on international law, as well as our courts, have uniformly held that a treaty is nothing more than a contract between sovereign and independent states.

1 Kent's Com., 175.
Cherokee Nations v. *Georgia*, 5 Peters, 1.
Foster v. *Nielson*, 2 Peters, 253.
Davis v. *Concordia*, 9 How., 287.
The Head Money Cases, 112 U. S., 580.

Extradition treaties, of course, are included under the general principle that treaties are contracts. More than this, extradition treaties are executory contracts, calling for the personal service of the contracting nations in regard to certain specified matters that may occur in the future.

"General compacts between nations may be divided into what are called *transitory conventions* and *treaties*, properly so termed. The first are perpetual in their nature, so that being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties. Such are treaties of cession, boundary or exchange of territory, or those which create a permanent servitude in favor of one nation within the territory of another."

Wheaton's Int. Law (Boyd), Sec. 268.
Taylor's Int. Pub. Law (1901), p. 367.

"Treaties, properly so-called, or *Foedera*, are those of friendship and alliance, commerce and navigation, which, even if perpetual in terms, expire, of course," in certain cases.

Wheaton, *Idem*, Sec. 275.

"The second class may be called executory treaties because they stipulate for the performance of successive acts to be continued through a period of time, limited or unlimited. All such agreements as thus fall in the second class may be conveniently described with reference to their objects as treaties of alliance, neutrality, guarantee, commerce, *extradition*, and the like."

Taylor, *Idem*, p. 367.

Extradition treaties, therefore, belong to the class of treaties of friendship and alliance. Since these treaties are executory the continued existence of the contracting parties is necessary in order that the provisions of the compact be enforceable. The general rule that in cases of personal, executory contracts, death of one of the contracting parties terminates the contract is applicable to extradition treaties. A contract to render personal service is subject to the implied condition that the party shall be alive and able to perform it. Death or disability which renders the performance impossible, discharges the contract.

1 Beach on Contracts, 946.
1 Parsons on Contracts, 131.
1 Addison on Contracts, Sec. 396.
Maxwell v. *Phillips*, 162 Mass., 309.
Lorillard v. *Clyde*, 142 N. Y., 451.

Since a treaty is a contract made by one government with another government and deals with the foreign relations of the nation, not with its internal management or regulation of the conduct of its own subjects or citizens, and extradition treaties are executory contracts of friendship between the contracting nations, they can be maintained and their provisions enforced only between inde-

pendent and sovereign political entities. The continued existence of the contracting nations as treaty-making powers is absolutely necessary to the performance of the contract. Hence appellant can be extradited only on the condition that an independent, sovereign nation with whom the government of the United States has an extradition treaty has made a demand for his surrender. If the state, with whom a treaty may have existed, has lost its independence and sovereignty, can no longer make treaties with other nations, nor appoint or receive ambassadors and other public ministers, then its demand for the extradition of appellant cannot be honored, because extradition is an international act and extradition treaties are executory compacts which "expire, of course, in case either of the contracting parties loses its existence as an independent state."

Wheaton Int. Law (Boyd), Sec. 275.

d.

No extradition exists between the United States and the German Empire.

This will be admitted. The complaint filed with the commissioner shows that extradition here is attempted under the treaty with Prussia, concluded in 1852. In discussing the question as to what foreign nation is concerned in extraditing appellant, it will likewise have to be admitted that the sovereignty of the nation seeking the extradition is vested solely in the German Empire. The power of making treaties is vested solely in the sovereignty of independent nations, and it must therefore follow that, in order that extradition can be considered in this case at all, an extradition treaty ought to exist be-

tween the United States and the German Empire. If this does not exist, it would seem that the surrender of appellant is out of the question because though extradition is an international act, it cannot take place in accordance with the general provisions of comity, but must be provided for by a specific compact between independent nations.

If it should be claimed that by the formation of the German Empire in 1871, the treaties of the various component states became, *ipso facto*, the treaties of the empire, such proposition would be in violation of every known principle of international law, as well as untenable under the law of contract. Such a transfer of treaty obligations could certainly not take place without the consent of the other contracting party. These obligations are founded, not merely on the contract itself, but upon those mutual relations beween the contracting nations which may have induced them to enter into certain engagements.

Wheaton's International Law (Boyd), Sec. 29.

A transfer of these obligations, thus contracted, to a new nation without the consent of the other contracting party is impossible.

The treaty of 1852 never included all the states now component parts of the German empire. Nor were there separate treaties with all the German states. How could a fugitive be extradited in case he came from such a state and should now be found in the United States? Take the case of Alsace-Lorraine. We had an extradition treaty with France while these provinces formed a part of that nation. We never had one with them separately. If the formation of the German empire absorbed the

treaties of the component states and made them imperial treaties, then a stituation is presented in which a sovereign nation has concluded a treaty with another sovereign nation which, however, has no validity over the whole of its own territorial jurisdiction. Such an anomaly cannot exist under the principles of international law. We submit that the contention of such a transfer of treaty obligations due to the formation of the German Empire cannot be seriously urged. The fact remains that no extradition treaty between the United States and the German Empire, as a nation, exists.

e.

The present status of Prussia as determined by the provisions of the German Constitution.

A few historical facts in this connection are pertinent. From 1820 to 1866 there existed the German Confederation, composed of states which were recognized as separate entities, having power to conclude treaties, to receive and accredit ambassadors and other public ministers.

Wheaton's International Law (Boyd), Sec. 47, *et sq.*

This confederation was dissolved by the war with Austria in 1866. On the 14th day of June, 1866, Prussia, through a decree of the king, declared the confederation abrogated and no longer of binding effect. Thereafter the North German Union was created in 1867. This Union included all the German states, except the four southern states, to wit: Bavaria, Wuertemberg, Baden and Hesse.

The North German Union and the southern states

were united and formed the German Empire in 1871. When the German Empire was created, a constitution was adopted, the provisions of which are important in determining the present status of Prussia.

The internal sovereignty of a nation is determined by its municipal constitution. Its external sovereignty is to a large extent determined by the same instrument.

Wheaton's International Law (Boyd), Sec. 20.

The preamble of the German Constitution is as follows (Translation by Prof. Edward J. James):

"His Majesty, the King of Prussia, in the name of the North German Confederation, his Majesty, the King of Bavaria, etc., conclude an *eternal alliance* for the protection of the territory of the Confederation and of the laws of the same, as well as for the promotion of the welfare of the German people. This Confederation shall bear the name of the German Empire and adopts the following Constitution."

4 Convention Manual of the 6th New York Constitutional Convention, 1894, p. 265.

The words in the original translated as "an eternal *alliance*," are *"einen ewigen Bund,"* and the true import of these words, we submit, is *"an eternal union."* Be that as it may, German public jurists have held that the German Empire is a *Bundestaat* (compositive state), and not a *Staatenbund* (a system of confederated states).

Klueber, Secs. 103a, 176, 248, 260, 261, 462.
Heffter, das Europaishe Voelkerrecht, Sec. 21.

Within this confederate territory the Empire exercises the right of legislation according to the tenor of the

Constitution and with the effect that the Imperial Laws take precedence of the laws of the states.

> Art. II, German Constitution (Wheaton, Sec. 51 b.)

In the very next article is found a very significant provision, to wit:

> "In like manner those treaties shall remain in force which have been concluded between the various states of the confederation in relation to the custody of persons who are to be expelled, the care of sick and the burial of deceased citizens."
>
> Art. III, German Constitution (Hart Intro. Fed. Gov., p. 99, Sec. 83).

Nowhere else is any mention made of any other treaty theretofore made by any of the states as remaining in force for the present or any other time. Consequently, under the well known and uniformly recognized principle of law, "*expressio unius est exclusio alterius*," it is clear that the German Constitution did not attempt, by implication even, to adopt existing state treaties as imperial treaties.

By Article IV of said instrument are vested all affairs universally recognized as national affairs in the empire and imperial legislature.

The presidency of the Union belongs to the King of Prussia, who bears the name of German Emperor and who represents the empire *internationally*, declares war, makes peace, enters into treaties, accredits and receives ambassadors.

> Art. XI, German Constitution (Wheaton, Sec. 51 b; Hart Intro. Fed. Gov., p. 165.)

A common citizenship (indigenat) for all Germany was established to the effect that the subjects of each state are to be treated in every other state as natives, and are to have the right of becoming permanent residents, etc. As to foreign countries, every German is entited to the equal protection of the empire.

Art. III, German Constitution (Hart Intro. Fed. Gov., pp. 138-141).

It is unnecessary to cite other provisions of the German Constitution to show that Prussia has lost her identity as a nation. When Prussia became a part of the German Empire she lost her sovereignty and independence as a nation as completely as though she had become a part of Great Britain. By the adoption of the Constitution, Prussia surrendered to the empire her right of legislation on national affairs, to declare war, make peace, conclude treaties, receive and accredit ambassadors, and every other incident of sovereignty and independence as a nation. She specifically designated the emperor as her representative in international affairs. It will be admitted that Prussia now could not perform any of the above enumerated powers of sovereignty, including the power to make treaties. It will likewise be admitted that the United States could not now conclude an extradition treaty with Prussia. These admissions conclusively establish the fact that Prussia is not now independent and sovereign, but that her independence and sovereignty as a nation was merged in the German Empire.

f.

The present status of Prussia as determined by the principles of International Law.

The principles of international law finally determine the status of Prussia at the present time, and since the formation of the German Empire. From these principles it is absolutely established that Prussia has lost her identity as a nation and is no longer considered a sovereign state.

> "By a sovereign state, we mean a community or number of persons permanently organized under a sovereign government of their own, and by sovereign government we mean a government, however constituted, which exercises the power of making and enforcing law within a community, and it is not itself subject to any superior government. These two factors, one positive, the other negative, the exercise of power and the absence of superior control—compose the notion of sovereignty, and are essential to it." Prof. Montague, quoted in
>
> Wheaton International Law (Boyd), Sec. 33 a.

> "The sovereignty of a state consists in the right of independent action without reference to the will of any other state."
>
> Levy Int. Law, p. 81, No. 9, and p. 82, No. 10.

It is true that states may be either single or may be united together under a common sovereign prince or by a federal compact. If sovereign states are permanently united together by a federal compact so as to form a supreme federal government, it is then called a *compositive state*. This is the international status of the German Empire. "Germany has now become a *compositive* state, and the independence of its various members is merged in the sovereignty of the Empire, though the

respective heads of the several states retain their personal position as sovereigns."

Wheaton's International Law (Boyd), Sec. 51 b.

In determining what the principles of international law are on a given question, courts seek aid from the works of jurists and commentators.

Fremont v. *U. S.*, 17 Howard, 542.
Sears v. *The Scotia*, 14 Wallace, 170.
Hilton v. *Guyot*, 159 U. S., 113.

Prof. E. A. Freeman, professor of Modern History in the University of Oxford, in speaking of the German Constitution, says:

"If it does not answer the perfect federal idea, it at least comes so near to it that it would be mere pedantry to refuse it a place among federal systems."

Freeman's Historical Essays, 4th Series, p. 389.

This agrees with Wheaton's idea of a compositive state or supreme federal government as distinguished from a system of confederates states.

See, also,

Taylor's Int. Pub. Law, p. 123.

It will be contended that the German Empire is a mere alliance and that therefore the treaties of Prussia were not abrogated by entering this alliance. We have already shown that the German Constitution is something more than a mere treaty of alliance. Furthermore, general alliances, under the principles of international law, are limited to contracts between nations having in view co-

operation in cases of defensive or offensive wars, waged against or by the parties to the alliance.

> Wheaton's International Law (Boyd), Secs. 278, 280.
>
> Taylor's Int. Pub. Law, p. 370.

It may also be contended that because the King of Prussia was made the President of the Union under the name of German Emperor, therefore Prussia retained her sovereignty and is as independent now as she ever was. In reply to this contention we again quote from Prof. Freeman, who, in speaking of the position of the King of Prussia, says:

> "To translate from royal into republican language, it is as if the Governor of the State of New York should be ex-officio president of the United States."
>
> Freeman's Historical Essays, *supra.*

German public jurists likewise hold that all sovereignty and independence of the individual German states were merged in the empire. Thus, Prof. Philip Zorn, of the University of Koenigsberg, in speaking of the German Constitution, says:

> "The kernel of the constitutional organization of the Empire is that the empire can constitutionally enlarge its powers without limitation, apart from the 'reserved rights,' and that the individual states must obey an imperial law of this nature like any other imperial law. Thus, the sovereignty and nature of the German Imperial State is established by evidence which admits not the slightest doubt. Every deduction which contests this point lacks logical foundation."
>
> Annals-Amer. Academy of Political Science, July-Nov. 14, p. 78.

Again, the same authority says:

"A number of the states were up to that time (the formation of the German Empire) legally unconnected, independent, sovereign; they now enter, as in a corporation, a combination which has the character of a unit, so that the single members become legally dependent, while the unit only is independent and sovereign."

Annals, *supra.*

He then makes the statement that all great jurists and writers in Germany, such as Leband, Hanel and G. Meyer agree with the statement we have just quoted.

This theory that the German Empire is a mere alliance of independent states may be founded upon the idea of government which found expression in the Articles of Confederation under which the Colonies sought to establish a government after the Declaration of Independence. Although Art. II of this instrument expressly provided that each state retained its sovereignty and the preamble stated that the confederation was a "firm league of friendship" merely, yet the separate states were never recognized by the nations of the world as one of their numbers.

Van Holst, Const. Hist. U. S., p. 24.
King, Elliott's Debates, V, p. 212.

Therefore, if the German Empire be a mere loose confederation, an alliance, if you please, yet the separate states have never been recognized by the nations of the world as independent and sovereign. Under all the authorities, however, this Empire is something more than an alliance between independent states; it is a unit, representing the sovereignty of the German people in the family of nations, one compositive and independent state.

Courts take judicial notice of the existence of a sovereign power.

Jones v. *U. S.*, 137 U. S., 202.

The United States having recognized the internal and external sovereignty of the German Empire as distinct from its states, is bound thereby.

U. S. v. *Wagner*, 2 App. Cas., L. R., 624.

Such being the nature and characteristic of the German Empire under the principles of the law of nations, the treaties, properly so termed, of the separate states with foreign nations were terminated by the formation of that Empire.

That the political department of our government, that is, the executive and legislative branches, have recognized the German Empire as the sovereignty now existing over the territory formerly composing the Germanic States, is conceded. Such recognition is binding upon the courts.

Gelston v. *Hoyt*, 3 Wheaton, 246.
U. S. v. *Yorba*, 1 Wallace, 412.
U. S. v. *Lynde*, 11 Wallace, 632.

Over the same territory, however, only one sovereignty can exist. When such sovereignty is once recognized and established, it excludes every other.

Wharton's International Law Digest, Sec. 1.
Church v. *Hubbard*, 2 Cranch., 187.
Schooner Exchange v. *McFadden*, 7 Cranch., 137.

The territory now included within the Kingdom of Prussia is represented in international affairs by the German Empire. Consequenty, in such affairs said Kingdom

can exercise none of the incidents, functions or duties of sovereignty. If it could, there would then exist two co-ordinate sovereignties over the same territory, a condition not only not recognized by the law of nations, but specifically denied.

Taylor's Int. Pub. Law, pp. 170, 173, 174.

Prussia has been merged in the German Empire and has, therefore, disappeared as a nation.

> "Single commonwealths may also disappear by being merged in federal unions which assume the entire control of their international affairs."

Taylor, *Idem*, p. 201.

It is true that when an entire state loses its identity by being absorbed into another the treaty obligations of the absorbing state are extended to the one absorbed.

Taylor, *Idem, supra.*

But in the case at bar, as far as the treaty of 1852 is concerned, the very reverse of this proposition is urged. Such contention is untenable.

The general principle of International Law applicable to this situation is as follows:

> "The obligations of treaties, even where some of their stipulations are in their terms perpetual, expire in case either of the contracting parties loses its existence as an independent state, or in case its internal constitution is so changed as to render the treaty inapplicable to the new condition of things."

Halleck's International Law, Ed. 1866, Sec. 8, p. 370.

Vattell Int. Law, Ed. Chitty, 1872, p. 312, Sec. 203.

Wildman International Law, V. 1, Ch. 4, Sec. 174.

Wheaton's International Law, Sec. 29.

> "Treaties, properly so-called, or *foedera*, are those of friendship and alliance, commerce and navigation, which, even if perpetual in terms, expire, of course;—I. In case either of the contracting parties loses its existence as an independent state."
>
> Wheaton's International Law (Boyd), Sec. 275.

As we have already shown, extradition treaties are treaties of friendship and consequently they expire if either contracting party loses its existence as an independent nation.

We respectfully submit that under the provisions of the German Constitution and International Law, Prussia lost her identity as a nation and ceased to exist as an independent state and consequently the treaty of 1852 between the United States and Prussia terminated, expired. The principles of International Law we have cited are conclusive on this proposition.

g.

The action of the political department of the Government as to other terminating treaties.

The political department of the government in this connection must be understood to mean the executive and legislative department as distinguished from the judicial department.

It is a significant fact that, although the United States had treaties or consular conventions with most of the German states, immediately after the formation of the German Empire, a consular convention was concluded with that Empire. (December 11, 1871.) It is contended that the present Empire is a no closer union than the old German Confederation, and therefore the extradition treaty with the separate states is still in force. If that is

so, why was it necessary to conclude a new consular treaty, a treaty of friendship the same as extradition treaties are, with the German Empire? If a new consular treaty with the empire was a necessity, why was not a new extradition treaty with the same nation a necessity in order that fugitives from justice might be extradited? The consular treaty referred to is found on page 363 of

Treaties and Conventions of the U. S. (1889).

We have already called attention to the fact that the German Confederation, existing from 1820 to 1866, was dissolved in the latter year on account of the war with Austria. Wuertemberg acceded to the treaty of 1852 with Prussia by a declaration dated October 13, 1853.

Treaties of the United States, 1146 (1889).

After the dissolution of the German Confederation with the members of which the treaty of 1852 was concluded, our own government, as well as that of Wuertemberg, considered this collapse of the German Confederation as terminating this treaty, because in 1868 a new treaty was made between these two nations, including the following article:

> "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between Wuertemberg and the United States on the 16th day of June, 1852, 13th day of October, 1853, remains in force without change."

Art. III, Treaty of 1868 with Wuertemberg.

Why the necessity of reviving this treaty, after the dissolution of the German Confederation in 1866, if the treaty was not affected or terminated by that event? Wuertemberg continued an independent nation, yet the two governments treated that convention as terminated until revived.

Again, as already stated, the North German Union was formed in 1867, and most of the states in that union had acceded to the treaty of 1852. The treaty of 1852 finally included twenty-seven German states and the North German Union included twenty-one of these states. If the treaty of 1852 was not terminated by the formation of the German Empire in 1871, why was it necessary upon the formation of the North German Union, including practically the same states that had concluded the treaty in 1852, to renew the provision for the extradition of fugitives by a new treaty in 1868, as was done? We quote:

> "The convention for the mutual delivery of criminals, fugitives from justice in certain cases, concluded between the United States on the one part and Prussia and other states of Germany on the other part, the 16th day of June, 1852, is hereby extended to all states of the North German Confederation."
>
> Art. III, Treaty of 1868, with North German Union.

It may be suggested that this provision in this treaty was included because new states were included, states with whom theretofore no extradition treaty had been concluded. The same is true in the case of the German Empire and the same necessity for an extension of the extradition provision existed in the latter case as in the former, and even more so because the Empire exists as a national unit while the North German Confederation was a league between twenty-three independent units.

Our government has considered a large number of other treaties concluded with nations that were afterwards absorbed by another nation, as terminated by such absorption. Thus the treaty with Algiers was terminated

in 1831 because French jurisdiction was extended by conquest over that nation. The Central American treaties of December 5, 1825, were terminated by the dissolution of the federation in 1839. All treaties with Hanover were terminated in consequence of its incorporation into the Kingdom of Prussia in 1866. The same is true as to treaties with Nassau on account of its absorption into the same Kingdom in 1846. The treaties with Sardinia and the two Sicilies were terminated by their absorption into the Kingdom of Italy. The treaty with the United Provinces of Netherlands, dated 1782, was considered terminated because the Netherlands became a part of France and then a part of Holland and finally a new Kingdom was formed, called the Kingdom of the Netherlands.

Wharton's Digest, Sec. 137a.

Thus even the political department of our government has considered a large number of other treaties as terminated when the sovereignty of the nation with which treaties had been concluded was destroyed by its absorption into another sovereignty.

If the political department of the government has treated the convention of 1852 as still of binding force and effect, it is apparent from the examples of other terminated treaties we have just cited, that the action of said department has not been consistent, and can therefore not be considered as a guide for the courts. We submit that the question whether the treaty of 1852 with Prussia was terminated or not is now before this Court as an original proposition, to be decided according to the principles of international law applicable to the facts and circumstances of the case.

h.

Objections to our contention considered.

In considering the objections that have been and may be raised to our contention that the treaty of 1852 was terminated by the formation of the German Empire, we meet first of all the opinion of Judge Blatchford in the case of *In re* Thomas, 12 Blatch., 379. The point was raised in that case that the extradition treaty with Bavaria concluded in 1853 was abrogated by the adoption of the German Constitution, but it was held that a treaty could not be abrogated by the action of Bavaria alone without the consent of the United States. The court apparently proceeded upon the theory that the question of the existence of the treaty in question came within the scope of what was called "voluntary validity" in *Jones* v. *Walker, supra,* but not within the doctrine of "necessary validity." As we have already shown, the question of the "voluntary validity" is not raised by our contention, but that of "necessary validity" is, a question of law to be decided by the courts. It does not appear that the principles of International Law which we have cited were invoked in the Thomas case. Furthermore, this case was decided in 1874, when the Empire had scarcely been organized and jurists had not as yet studied its nature and characteristics. Since that time specialists have given this peculiar form of government careful and industrious attention, and their conclusions we have already cited. We respectfully submit that the doctrine in the Thomas case is inapplicable to the questions raised by our contention in the case at bar.

The Illinois cases relied on (*Wunderle* v. *Wunderle,* 144 Ill., 59, and *Scharpf* v. *Schmidt,* 172 Ill., 255), con-

sidered transitory treaties, that is, those which act once for all and under which private individuals secure vested rights, and it was held that the formation of the German Empire did not abrogate these treaties. We have already cited authorities on International Law to the same effect that vested rights secured by individuals under treaty provisions are not affected by the disappearance of the treaty-making power of one of the contracting nations. But the treaty in question is not a transitory treaty, but a treaty of friendship, which, according to Wheaton (Sec. 275), expires of course in case either party loses its existence as an independent state. Consequently these cases are inapplicable to the case at bar and have no persuasive force in determining the question now presented.

Then we have been told that the two governments have for thirty years reciprocally extradited fugitives under the old treaty. This suggestion must be based on the old doctrine "whatever is, is right," and "whatever has been done, always must be done." Such a doctrine can not be countenanced by our courts. It may be contended that such action on the part of the two nations has placed a practical construction upon the situation and made the old contract between the United States and Prussia a living contract between the United States and the German Empire. This contention admits the principle that extradition is an international act, and this principle must be recognized since it has been so declared by all the authorities. But how could our contract with Prussia become a contract with the German Empire? Did the Empire absorb the contracts of its component parts and did a contract of a part become a contract of the whole without the express consent of the other contracting party? If the German Empire is merely a confederation and part-

nership, did the compact of one of the partners theretofore made become a compact of the whole partnership, especially when the partnership agreement (constitution) was not merely silent on this question, but specifically vested the making of all compacts in the official head of the confederation?

As we have already shown, extradition treaties are executory contracts, calling for the personal service, as it were, of the contracting nations. This contention of the appellee we are now considering must be based on the proposition that the compact in question was assigned or transferred by Prussia to the German Empire when the latter was created. That a contract, executory in its nature and calling for the personal service of one of the contracting parties, cannot be assigned without the express consent of the other contracting party, is well settled by the authorities.

Smelting Co. v. *Mining Co.*, 127 U. S., 379.
Delaware County v. *Safe & Lock Co.*, 133 U. S., 473.

For the same reason the doctrine of *novation* of the compact cannot be successfully invoked.

Boston Ice Co. v. *Potter*, 123 Mass., 28.
Spycher v. *Warner*, 74 Wis., 456.

That a transfer of treaty obligations from Prussia to the German Empire cannot be established by the conduct of the two now existing nations as to the treaty of 1852, we shall show in discussing the following objection.

It will be urged that our position with reference to the treaty of 1852 is untenable because the foreign departments of both nations have taken affirmative action to

extend said treaty, practically, so as to substitute the German Empire for the several states with whom the convention was originally concluded. Counsel for appellee is forced to assume that position because extradition being an international act, and it being conceded that no extradition treaty exists between the United States and the German Empire, some theory as to the adoption of the treaty of 1852 by the present Empire and by our government with that Empire must be advanced. If the treaty in question has become the treaty of the German Empire, the process by which such a transformation took place is, in effect, the concluding of a new compact between the two nations. This is clear in the action taken in extending the treaty to the North German Union and renewing the one with Wuertenberg. Attention will be called to the Memorandum promulgated by the German Foreign Office in June, 1889, and found on page 725 *et seq.* of Vol. I in Moore on Extradition. From this Memorandum it will be contended that it is clear that the German Empire has recognized and adopted the treaty of 1852 as the treaty of the Empire. If this is true then the German Empire has practically attempted to conclude a new extradition treaty with this country. It may be that the promulgation of this Memorandum is sufficient to accomplish this end as far as the German Government is concerned. We doubt it, however, on account of the provisions of the German Constitution on the subject of treaties. But granting that such action is sufficient as far as the Empire is concerned, is it sufficient to make it a treaty of the United States?

In the first place, no memorandum of a like nature promulgated by the foreign office of the United States has been cited. If it had it would be insufficient because our

Constitution provides how treaties are to be made. Treaties can only be made by the president, by and with the advice and consent of the Senate.

Section 2, Art. II, Constitution.

No mere act by the Executive alone, or by the foreign department, can create treaty obligations. The political department of our government, as far as treaties are concerned, consists of the Executive and the Senate. The act of either alone is ineffectual. The acts of the political department in extraditing fugitives under the treaty of 1852, upon which acts counsel rely so much, have been the acts of the executive department alone. No act of consent and advice of the Senate has been, or can be, shown. Hence, the fact that for thirty years fugitives have been surrendered cannot even establish a course of conduct, a rule of interpretation, because such acts were performed and such a course was pursued by only one branch of the political department and not the *whole* thereof, as the Constitution requires. Furthermore, not even an opinion from the law department of the executive branch has been produced, holding that extradition under the conditions existing between this government and the German Empire or Prussia could now legally take place. In fact, we were told that warrants of surrender were issued as of course and a fugitive's only remedy was an appeal to the courts. And when the contention of appellee is that the treaty of 1852 has been extended to the German Empire, in effect renewed, action by the President, by and with the advice and consent of the Senate, is absolutely necessary under the Constitution, to make such extension and renewal effectual. Such action was taken, as already stated, in the cases of the ex-

tention to the North German Union and the renewal with Wuertemberg.

Treaties and Conventions, p. 790, 1146 (1889).

There can be no tacit ratification of the renewal or extension of a treaty under our Constitution. No treaty under our system of government becomes effectual because of failure to repudiate. Nor will mere affirmative action by the executive department alone create treaty obligations.

Taylor's Int. Pub. Law, p. 389 (note).

If the whole question of the existence of the treaty of 1852 must be left to the political department, as is claimed, then the action of such department in attempting to solve the problem is subject to review by the courts to determine whether such action was in accordance with the provisions of the Constitution, or not. If it appears that the action in attempting to renew, extend, in fact, conclude a new treaty, was not in accordance with the Constitution in that such action was not taken by and with the advice and consent of the Senate, then it must follow that no fugitive can now be legally surrendered to the German Empire or Prussia, no matter how many have been surrendered during the last thirty years. The provisions of the fourteenth amendment require "due process of law" before an alien even can be deprived of his liberty.

It may be urged that if it should be held that the treaty of 1852 was terminated, such decision would create confusion and might be considered a violation of our friendly relations with the German Empire. These suggestions

cannot be entertained by the Court. But even if they could be they are without merit. In the first place, by the law of nations no duty is imposed upon a nation to deliver up persons accused of crimes who have escaped into its territories on the demand of another nation against whose laws the alleged crime was committed. There is no such obligation under the principles of International Law.

Wharton's Digest, Section 268.
Wheaton's International Law (Boyd), Section 115.
U. S. v. *Watts*, 14 Fed. Rep., 130.

As every sovereign state is independent of every other in the exercise of its judicial powers (Wheaton, Section 111), it follows that if the courts of the United States should hold that under the Constitution and the laws of this country, no extradition treaty exists, no nation can have a just cause for complaint.

As to the surmised confusion that might arise in case our contention is sustained, suffice it to say that it could not possibly affect persons surrendered by either nation under what we contend is a terminated treaty because it has been uniformly held that it makes no difference how a person was brought within the jurisdiction of the court, the fact that the accused is in court is sufficient to require him to answer to the charge brought against him.

State v. *Brewster*, 7 Vt., 118.
Dow's Case, 18 Pa., 37.
The Richmond v. *U. S.*, 9 Cranch., 107.
Ker v. *People*, 110 Ill., 627.

And see

Ker v. *Illinois*, 119 U. S., 436.

A new treaty, properly concluded, can be easily made between the two nations and thus the anomaly existing between the United States and the German Empire on matters of extradition will be removed. No confusion can possibly result.

i.

Extradition under the treaty of 1852, granting that it was not terminated, is now legally impossible.

The jurisdiction of the commissioner to issue warrants for the extradition of fugitives, is created by the provisions of Sections 5270 of the Revised Statutes of the United States. This jurisdiction depends upon two facts:

First. That a treaty or convention for the extradition of fugitives between the demanding government and the government of the United States exists, and,

Second. That the fugitive is charged with having committed within the jurisdiction of such demanding government, any of the crimes enumerated in said treaty or convention.

As extradition proceedings are purely statutory, compliance with the statutes is requisite to jurisdiction at every step.

State v. *Huegin*, 85 N. W. Rep., 1046 (Wis.).
Church *Habeas Corpus*, Secs. 237-247.
In re Snell, 31 Minn., 110.
In re Hardigan, 57 Vt., 100.
People v. *Protectory*, 106 N. Y., 604.
Ex parte Becker, 86 Cal., 402.

Therefore, the existence of the two statutory conditions, treaty with demanding country, and a crime within

the territory of such demanding country, is absolutely essential to give the commissioner jurisdiction to issue the commitment under which appellant is now restrained.

What is meant by committing a crime within the jurisdiction of a foreign government?

> "A crime is an act committed or omitted in violation of a public law either forbidding or commanding it."
>
> 4 Bl. Com., 15.
>
> *U. S.* v. *Jacobi*, 1 Flip. (U. S.), 111.
>
> *In re Bergin*, 31 Wis., 386.
>
> *U. S.* v. *Eaton*, 144 U. S., 677.

Appellant is charged in the complaint with having committed the crime of forgery. Consequently he is charged with having violated the law of the demanding country forbidding the commission of forgery. Under our statutes the demanding country must have a law against forgery, which has been violated, before extradition can be considered at all.

A crime is an offense against the sovereignty and can only be taken notice of and punished by the sovereignty offended. Others have no concern in it and must treat it as a matter of indifference.

> *People* v. *Williams*, 24 Mich., 163.
>
> *Huntington* v. *Attrill*, 146 U. S., 657.

With the enforcement of the criminal laws of one independent state within its territory, another state has no concern.

> Wheaton's Inter. Law (Boyd), Sec. 113.

Applying these principles to the situation presented by the case at bar and granting, for the sake of argument,

that Prussia is still an independent nation, appellee must establish one of the following propositions to justify the commissioners' jurisdiction:

First. The German Empire is the demanding government and is entitled to the extradition of the appellant because a treaty exists between it and the United States and its criminal laws have been violated, or,

Second. Prussia is the demanding country and is entitled to receive appellant because a treaty exists between it and the United States and its laws have been violated.

If, however, it should transpire, as the fact is, that the country whose laws were violated has no extradition treaty with us and the country which has a treaty, has no criminal laws which appellant could have violated, then, we submit, extradition is legally impossible. That such is the situation we shall now proceed to demonstrate.

It is true that the complaint in question alleges that the demand is made by both the German Empire and the Kingdom of Prussia and repeatedly alleges that the laws of Prussia were violated by the alleged acts of the appellant. But when the provisions of law, which appellant is charged with having violated, are cited, such provisions are Imperial Laws and not a single Prussia criminal law or statute is cited, nor can one be cited, because it does not exist. In short, an attempt is here made to extradite appellant for having violated a law or laws of a nation with whom we have no treaty under the provisions of a convention with a nation whose laws have not been violated. As well might an attempt be made to extradite a fugitive from a foreign country to this country by a state of the Union whose laws have not been violated, for the violation of a Federal Law.

Previous to the formation of the German Empire the North German Union had adopted a criminal code. The German Constitution provides that Imperial legislation superceded all legislation as to civil and criminal matters and judicial procedure therefore enacted by the several states.

Dr. H. Wagner, University of Koenigsberg, in Ency. Brittanica, Article—Germany.

It is provided that the enactment of the general criminal law is exclusively confined to the Imperial Legislature.

Art. IV, Sec. 13, German Constitution (Hart. Intro. Fed. Gov., p. 135).

The criminal code of the North German Union, above referred to, was adopted as the code of the German Empire and took effect as such Imperial code January 1, 1872.

Art. 80, Subd. 2, German Constitution.
Proclamation of Emperor, Apr. 16, 1871.

The enacting chapter of the German Imperial Criminal Code establishes the fact that Prussia as such now has no criminal laws which can be violated and has not had any since January 1, 1871. By Sections one and two of this enacting chapter, it is provided that the Imperial Criminal Code is to take effect January 1, 1872, and that on that day all other criminal laws, codes and procedures then in force, with respect to subjects contained in the Imperial Code, were repealed.

Provisions as to the crime of forgery are found in this Imperial Code and are contained in Sections 267, 268, 146 and 149, the very sections quoted in the depositions filed with the amended complaint. No Prussian criminal

provisions were cited, for the sufficient reason that none exist. The Imperial laws of Germany are the laws of Prussia, the same as the Federal Laws are the laws of all the states. But the latter cannot attempt to enforce the laws of the general government because the sovereignty that creates the law can alone enforce it. The same is true of Prussia, as far as Imperial laws are concerned. If Prussia is still an independent nation, she then has no concern whatever in the violation of the Imperial laws. "The courts of no country execute the penal laws of another."

The Antelope, 10 Wheaton, 123.

It follows, then, that appellant cannot be charged with having committed forgery within the jurisdiction of the Kingdom of Prussia, and of what avail is the treaty of 1852, since the statute contains the jurisdictional requirement of both a treaty with and the commission of a crime within the jurisdiction of, the demanding government?

It is clear that the conditions existing at the time the treaty of 1852 was concluded have so materially and radically changed that even if such treaty was not *ipso facto* terminated by the formation of the German Empire, its obligations cannot now be performed and therefore the whole compact has absolutely expired.

Wheaton Int. Law (Boyd), Section 275.
Wharton's Digest, Section 137a.

If Prussia is still a nation, the crime of forgery, cannot now be committed within her jurisdiction, and consequently extradition at her demand is impossible under our laws. If she is no longer a nation, then she has

neither a treaty or a criminal code which can can be made the predicate for extradition—an international act.

It may be urged, as was in the court below, that although Prussia has now no specific criminal code, yet she merely delegated her power to enact criminal laws to the Empire and laws so enacted are still her own specific laws. A delegation of powers, without reservation, excludes the exercise of such delegated powers by the state surrendering them. Not only did Prussia voluntarily surrender her powers to enact criminal laws to the Empire, but with her consent her own existing criminal laws were repealed. Extradition under the treaty of 1852 with Prussia might as well be attempt in case the fugitive was charged with having committed the crime of forgery in France, as under the conditions existing in the case at bar, since Prussia has no more power to enforce the penal laws of the empire than she has to enforce the penal laws of France.

We may be told that this nation has no interest in the manner in which the criminal laws of another nation are enacted and enforced, and since the German Empire and the Kingdom of Prussia unite in demanding appellant's surrender, it is immaterial whose laws he is charged with having violated. The first part of this proposition we admit, but the second we emphatically deny, because our statutes make it an absolute condition, without the existence of which extradition cannot be considered, that a treaty shall exist with, and a crime committed within the jurisdiction of, the demanding country. That counsel appreciates the force of our position on this proposition is clear from the complaint itself because it contains repeated allegations that appellant violated the laws of the

Kingdom of Prussia. The trouble, however, is that when the provisions of laws which it is claimed were violated, are cited and quoted, it appears that they are Imperial laws and not Prussian laws.

Applying the jurisdictional requirements of Section 5270, Revised Statutes, to the facts and circumstances in the case at bar, we find that the German Empire demands the extradition of appellant because he is charged with having violated Imperial criminal laws. But it is admitted that no extradition treaty exists between the United States and the German Empire. Extradition, however, is sought to be effected by a treaty or convention in existence between the United States and Prussia. But no Prussian criminal laws have been violated; therefore, in either case, one of the necessary requirements for the jurisdiction of the commissioner is wanting. In one case no treaty exists and in the other case no law has been violated. This proposition, we submit, is decisive on this question. Forgery is not a crime within the jurisdiction of Prussia, although it is a crime within the jurisdiction of the German Empire, which jurisdiction extends over Prussian territory and is exclusive.

Taylor's Int. Pub. Law, p. 206.

To extradite appellant under the provisions of the treaty of 1852, would be in violation of the terms of the treaty itself, which provides that persons shall be delivered who have committed certain enumerated crimes "within the *jurisdiction* of either party," not territory, and who shall seek "an asylum, or shall be found in the *territories* of the other" (the pertinent section of the statute, 5270, uses the word *jurisdiction*). The United States will not grant extradition for crimes

not committed within the jurisdiction of the demanding state.

Hawley, Int. Extradition, 22.
Wharton's Digest, Section 271.

Fourth.

THE COURT OUGHT TO HAVE HEARD TESTIMONY FOR THE PURPOSE OF DETERMINING THE ISSUES RAISED BY THE PLEADINGS IN THE CASE.

The District Court held that the *habeas corpus* proceedings ought to be limited to an inspection of the papers on file with the commissioner, and if these disclosed no jurisdictional error, the writ ought to be dismissed.

We contend that testimony ought to have been received in connection with the record on file before the commissioner, *not for the purpose of determining the guilt or innocence of the prisoner, or the criminality or want of criminality, sufficient for his extradition*, but for the purpose of determining the legality or illegality of his restraint. We base our contention on the following proposition:

a.

The statutes of the United States so provide.

The statutes provide for the receiving of testimony on *habeas corpus* proceedings. The provisions are:

> "The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of ***habeas corpus*** for the purpose of *an inquiry into the cause of restraint of liberty.*" (Italics ours.)

Section 752, Revised Statutes.

"The court of justice, or judge shall proceed in a summary way to determine the facts of the case by *hearing testimony and arguments*, and thereupon to dispose of the party as law and justice require." (Italics ours.)

Section 761, Revised Statutes.

Appellant alleged in his petition a number of reasons why his restraint was unlawful and without authority in law, and we respectfully submit that under the sections of the statutes just quoted, the court ought to have received competent testimony when it was offered by the appellant.

b.

Habeas corpus proceedings are original, civil suits.

The *habeas corpus* proceeding before the District Court was an original civil proceeding. It has been established beyond question that the *habeas corpus* proceeding is a civil suit to enforce the civil right of personal liberty. It is not a criminal proceeding at all. If a criminal proceeding does precede it and the *habeas corpus* is brought in consequence of such criminal proceeding, yet the latter is still a civil suit and partakes in no way of the nature of the antecedent criminal proceeding.

Ex parte Tong, 108 U. S., 556.
Cross v. *Burke*, 146 U. S., 82.
Kurtz v. *Moffit*, 150 U. S., 487.
Ex parte Frederich, 149 U. S., 73.

The proceedings before the District Court being a civil suit, appellant was the plaintiff and the marshal the defendant. The petition was the bill on complaint; the return of the marshal, the answer and appellant's traverse the reply to such answer. These were the pleadings in

the case. The issue thus raised was the unlawful detention of the plaintiff, and it would have been proper for him, yea it was his duty, to introduce testimony tending to establish his cause of action.

c.

In a proper case the court can hear testimony outside of the record of the inferior tribunal.

Upon proper case presented by the petition and the traverse, a court will hear proof of facts outside of, though not inconsistent with, the record of the inferior court. The power of the court to do this cannot be questioned under the repeated decisions of this court.

In re Cuddy, 131 U. S., 280.
Ex parte Yerger, 8 Wall., 85.
Ex parte Mayfield, 141 U. S., 107.

We had alleged in our petition and traverse facts tending to show that appellant was entitled to a discharge, notwithstanding the commissioner's warrant of commitment. Under the authorities just cited, we respectfully submit, we were entitled to prove those facts.

d.

Before final judgment by a court of competent jurisdiction, the whole case will be examined under a habeas corpus proceeding.

It has been uniformly held that, before a final judgment by a court of competent jurisdiction, the Federal Courts may openly and freely investigate the warrant of commitment and go behind it and inquire into the facts upon which it is based.

U. S. v. *Hamilton*, 3 Dallas, 17.

Ex parte Burford, 3 Cranch., 448.
Ex parte Watkins, 3 Peters, 193.
Ex parte Bollman, 4 Cranch., 75.

The *habeas corpus* proceedings in the District Court had been brought before there had been a final judgment by a court of competent jurisdiction. The cause of the commitment was that appellant had committed an extraditable offense. He denied that by his traverse and under the authorities, the court ought to have heard the evidence and decided this question.

For these reasons, we respectfully submit, the District Court committed error in declining to hear testimony affecting the legality or illegality of appellant's restrain.

Fifth.

THE COURT OUGHT TO HAVE GRANTED APPELLANT'S PRAYER FOR A WRIT OF CERTIORARI IN AID OF THE WRIT OF HABEAS CORPUS.

The court having declined to receive testimony on the hearing, appellant sought to establish the issues raised by his pleadings by praying for a writ of *certiorari* in aid of the writ of *habeas corpus* so as to bring, at least, the record and testimony then before the commissioner, to the attention and for the consideration of the court. This prayer was denied. We submit that the prayer filed with the District Court alleged sufficient facts to have justified the court in granting it. (Rec., page 54.) It may be true that the granting of the writ of *certiorari* is within the discretion of the court to whom the application is made, yet this discretion is not an arbitrary one, but is a

sound, judicial discretion, dependent upon certain legal principles applicable to the case.

School Trustees v. *Directors*, 88 Ill., 100.
Flourney v. *Payne*, 28 Ark., 27.

Furthermore, the writ of certiorari was prayed for, in this case, in aid of the writ of *habeas corpus* and for the purpose of bringing before said District Court the full records of the case so that said court might have had all the facts before it in determining the issue raised. At common law the writ of certiorari was frequently used in aid of the writ of *habeas corpus* to bring up the record of the proceeding resulting in the commitment when such record was necessary to a complete understanding of the case.

Rex v. *Marks*, 3 East., 157.
Fazacharly v. *Baldo*, 1 Salk., 352.

In the Federal courts the writ of certiorari has been considered, in appropriate cases, as ancillary to that of *habeas corpus*, and has been frequently used as a means of rendering their jurisdiction under the latter writ effective, and even this court has granted writs of certiorari in aid of its original jurisdiction in cases of *habeas corpus*.

In re Martin, 3 Blatchf., 303.
Ex parte Yerger, 8 Wallace, 85.
Ex parte Jackson, 96 U. S., 727.
Ex parte Lange, 18 Wallace, 163.

The contention of counsel in the court below that the writ of certiorari is never granted before the final determination of the case pending in the lower court is untenable. At common law the writ was more properly

used to remove proceedings before judgment than after judgment.

Heinchman v. *Cook*, 20 N. J. L., 271.

Unless the common law writ has been modified by statute, it will be allowed at any stage of the criminal proceedings.

Rex v. *Hube*, 5 Ten. Rep., 542.
Rex v. *Wadley*, 4 M. & S., 508.
Mowery v. *Camden*, 49 N. J. L., 106.

But whatever the rule in this respect may be as to the granting of the writ, in the case at bar it was not prayed for to review the question of the commissioner's jurisdiction because his jurisdiction had already been challenged by the writ of *habeas corpus*, but to aid the latter writ by bringing up the record. The petition of appellant for this writ showed that its purpose was to bring before the court copies of the depositions taken in his matter before the German tribunals, the copy of the original warrant issued by the German court, copies of the provisions of the criminal code of the German Empire, all of which copies were on file with the commissioner at the time the writ of *habeas corpus* was issued. As the court had already declined to receive testimony, the importance of these records is readily appreciated when it is remembered that, waiving the question of the existence or non-existence of a treaty, appellant claimed these depositions, the warrant issued in Germany and the provisions of the German criminal code showed that he was not charged with an extraditable offense. Therefore, we respectfully submit that the District erred in denying appellant's petition for a writ of certiorari.

Sixth.

THE COURT ERRED IN HOLDING THAT THE RECORD BEFORE THE COURT SHOWED THE COMMISSION OF AN EXTRADITABLE OFFENSE.

In discussing this assignment of error we are compelled on account of the ruling of the District Court not to receive testimony on the hearing, to rely on the record as presented by the pleadings. In our traverse to the marshall's return to the writ of *habeas corpus*, we included the deposition taken in Germany and filed with the commissioner previous to the suing out of the writ and also translations of certain provisions of the German Laws, which provisions we deemed pertinent to the issue. The correctness of these depositions and provisions are not challenged and we are justified therefore in discussing them.

On account of the contention of counsel in the court below, we are compelled to call the attention of this Court to a fact which does not appear of record. The writ of *habeas corpus* was sued out of the District Court after the depositions taken in Germany had been filed, but before the hearing had been had and concluded before the commissioner. While the *habeas corpus* proceedings were pending and undetermined the commissioner proceeded, over our protest, with the extradition hearing and made his findings. Evidence in addition to the depositions included in our traverse, was introduced, and counsel have urged this fact as an insurmountable objection to the consideration of this specification of error. The proceedings of the commissioner after the writ was sued out are not considered by appellant in the case at bar, but the only

issues raised are those that existed *at the time* the case was brought into the District Court by the issuance of the writ.

In discussing this assignment of error, we shall briefly consider, first, the sufficiency of the complaint; and, second, the evidence.

I.

The amended complaint contains about twenty-four counts, and aside from the general omnibus count charging forgery, counterfeiting and uttering, it attempts, in substance, to charge:

First. The forging and uttering of forged stock certificates, the forgery consisting in the impression made upon said certificates by a simulated stamp, purporting to to show that the revenue tax had been paid.

Second. False, fraudulent and fictitious entries in account and invoice books and altering entries therein.

Third. Forging acceptances on bills of exchange and altering them. (Record, pp. 8-19.)

We shall confine ourselves to the first of these charges in discussing the sufficiency of the complaint, as the evidence, as we shall show later, utterly fails to establish the second and third charges.

As already intimated, the general charge of forging certain stock certificates is followed by an allegation, as was necessary, attempting to show in what the forgery consisted, and from this allegation it appears that the forgery consisted wholly and exclusively in affixing to said certificates the impression of a steel stamp, which impression purported to show that the revenue tax had been

paid. Appellant is likewise charged with having forged this stamp, and then it is charged that he did this to defraud the government out of its revenue. The certificates were forged to defraud certain parties named; the forgery consisted in a false revenue stamp, which stamp was forged to defraud the government. Nowhere it is charged that this stamp was necessary to give the instrument validity. The only purpose of the stamp was to show that the revenue tax had been paid. Under these conditions, was the placing of such a stamp forging *the whole instrument?*

What is meant by a certificate of stock? A certificate of stock is a right, strictly speaking, to participate in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers and the management of their concerns; to share in the dividends and profits and to receive an aliquot of the proceeds of the capital on winding up and terminating the active existence and operations of the corporation.

Fisher v. *Essex Bank*, 3 Gray, 377.
Farrington v. *Tennessee*, 95 U. S., 679.
McAllister v. *Kuhn*, 96 U. S., 87.

The certificate is merely the written acknowledgment by the corporation of the interest of the subscriber in its property and franchises. It transfers nothing from the company to the subscriber, but simply affords the latter evidence of his right.

Burr v. *Wilcox*, 22 N. Y., 551.

The certificates in question comply exactly with these definitions. (Rec., pp. 39, 43.) The signatures were all genuine, the endorsements of their entry in the stock book

were genuine, and since Terlinden was the only stockholder he could issue as many certificates as he wished. The only thing not genuine, as far as the allegations of the complaint are concerned, was the impression on the face of the certificates that the revenue tax had not been paid.

Appellant being the only stockholder (Rec., p. 38), and therefore lawfully entitled to issue as many certificates of stock as he wanted to, these certificates were nothing more than promissory notes, to be paid when the corporation was dissolved, and meanwhile to draw such interest as the dividends paid out of the surplus profits would amount to. But these notes were required to pay two per cent. revenue tax. It does not appear, nor is it alleged, that the affixing of such stamp was necessary to give the certificate of stock negotiability even. If appellant issued and negotiated the certificates of stock, representing them to be genuine stock of his own corporation, of which he was the only stockholder, and it should appear that they were not original and genuine stock certificates, the most he could be guilty of would be obtaining credit by false pretenses, which offense is not included within the extradition treaty of 1852, if said treaty should be held to be still in force.

Another view of the case under such circumstances is that appellant could be charged with having "watered" his stock. "Watered stock" has been defined as stock issued without any consideration, and has been held to be perpetrating a wrong upon the corporation and fraud upon every person who takes such stock as full paid stock.

Barnes v. *Brown*, 80 N. Y., 534.

By issuing watered stock in this case, appellant could not perpetrate a wrong upon the corporation, because he was the corporation, and if a fraud was committed upon others who took it, he could not be guilty of forgery, but at most of false pretenses. Persons taking such stock could hold the corporation liable in damages, which in this case meant appellant.

Allen v. *Ry. Co.*, 150 Mass., 207.
Moores v. *Citizens' Bank*, 111 U. S., 156.

Under the peculiar conditions of this case, appellant was liable for all certificates, whether genuine or spurious. Under such circumstances it seems impossible that any stock, issued as the stock in question was, the signatures genuine, and issued by the only stockholder of the corporation, could be spurious.

Our conclusion on this branch of the argument is, that as appellant was the corporation, he could issue as many certificates as he wished, such certificates being in effect but promissory notes, unless the charter of the corporation limited such stock issue, and if it did, then the issue would be "watered stock" and he would be personally liable the same as he was for the stock issued within the limits of the charter provision. At any rate, he cannot be guilty, under any possible construction of the case, of forgery, but at most, false pretenses, provided he represented that the alleged spurious stock was within the limits of the charter of the corporation.

Referring again to the alleged forged revenue stamp, we desire to say that it has been repeatedly held that the Stamp Act, that is, the revenue stamp act, is a mere revenue law, which does not affect the validity of the instrument.

Rex v. *Norton*, 2 East. C. C. L., 856.

People v. *Frank*, 28 Cal., 507.
Cross v. *People*, 47 Ill., 152.
State v. *Hill*, 30 Wis., 416.
Campbell v. *Wilcox*, 10 Wall., 421.

The above decisions are all based on acts which required certain instruments to be stamped, and invalid and of no effect if the stamp was omitted with intent to defraud the government of the stamp duty.

The German laws provide for the making and using of a false stamp impression or false stamp, indicating the payment of the tax, and a special punishment is imposed, not exceeding three months' imprisonment.

German Penal Statutes, Sec. 275.

(Rec., p. 29.)

Another provision of the German laws provides that the person who uses a stamp upon papers held equal to paper money, under Section 149, which stamp was prepared without authority, is punishable by a fine not exceeding 150 marks.

German Penal Stat., Subd. 4 and 6, Sec. 360.

(Rec., p. 28.)

Consequently under all the authorities cited, granting that the stamp in question was spurious, the using of this stamp upon these certificates did not constitute forging the instruments themselves. As shown, the using of such stamp would have been at most a slight misdemeanor; certainly not an extraditable offense.

It has been held that a forged certificate on the face of a check, showing that the drawer had money in the bank, is not forgery of the check.

Clements v. *People*, 5 Parker's C. R., 337.

We therefore submit that under no possible construction of the law applicable to the case, the alleged spurious stamp upon the certificates of stock can be considered as forgery, as an extraditable offense, granting that appellant committed this particular act as charged.

II.

In discussing the evidence before the court on the appeal, not for the purpose of reviewing the sufficiency of the evidence, but for the purpose of showing that this appellant is not guilty of an extraditable offense, we shall take up the three charges as alleged in the complaint.

a.

The alleged false entries in the invoice book.

This allegation is attempted to be established by the testimony of one Henry Latwesen. (Rec., pp. 34-35.) He states that in April or May his bank became suspicious whether the drafts drawn by Terlinden were drawn against actual delivery of goods; that his colleague Arrioni made an examination of the books of the Terlinden Stock Company, particularly the invoice book; that it appeared that the original invoices corresponded with the amount of the draft; that when the crash came, it became apparent that the invoices which were found in the copy-book, were in fact fictitious. That is his whole testimony. He does not state how this became apparent, who submitted the copy-book, who made the entries and who had charge of the books. Neither Schulte or Seven, who swore that the acceptances on a draft purporting to have been drawn against them for actual delivery of goods, were spurious, deny that they had received goods against

which drafts might be drawn. Where, then, is the evidence that the entries in the invoice book were fictitious? Where is the evidence that appellant had anything to do with the books? It must be remembered that only after the "crash" came, did these people claim the acceptances were forged. The goods, no doubt, were delivered, but they did not want to pay for them then, and if the goods were delivered the entries in the invoice book were genuine. But whether these entries were genuine or not, there is absolutely no evidence to show that appellant had anything to do with the books, knew anything about them, nor is any circumstance shown from which it could be inferred, first, that there were false entries, and, second, if there were, that appellant had anything to do with or knew anything about them. The only testimony on this charge is that of this witness, Latwesen.

b.

The alleged forged acceptances on the drafts.

The drafts, the acceptance of which are claimed to be forgeries, are three in number and the names which are claimed to be fictitious are Henry Schulte and William Seven. In the first place, all these drafts are signed by the Gerhard Terlinden Stock Company, Kospadt p. Mueller, clearly indicating that the appellant had no personal connection with the transaction. (Rec., pp. 35, 36, 47, 49, 50.) It appears from the testimony that Kosbadt was the financial man of the concern; the treasurer, as it were, who attended to all money matters of the corporation and had that department of the business entirely and exclusively under his management. The appellant was the practical man of the institution, the mechanical manager, the mechanical expert.

The witness Schulte testifies that he gave appellant a draft book and "rather often signed acceptances both in blank as well as such as were filled." (Rec., p. 33.)

He denies that the signature or acceptance on the particular draft was his. He does not testify that he knows who signed his name and can't even surmise. On the same page he deposes that he told Terlinden he would accept no more drafts, yet on the same day he accepted twelve drafts. (Rec., p. 48.)

The witness Seven likewise testifies that he did not sign the two acceptances on two certain drafts, "but I cannot testify who did execute these signatures." (Rec., p. 36.)

He testifies to a long series of draft transactions between him and the corporation extending over seven years. Recalled, this witness deposes that during the past years it often happened that drafts which he had not accepted were sent to him for redemption, and though protesting, he paid them. "Kosbadt at that time admitted to me—this may have been the latter part of 1900—that he wrote my name, and that he had direction from Terlinden to do this, Kosbadt did not say." (Rec., p. 51.)

This is all the material testimony of the two persons whose acceptances are claimed to be forged gave. The testimony of the other two witnesses shows that the appellant had absolutely nothing to do with the acceptances, granting that they were forged, and we do not—nor knew anything about them.

The book-keeper, Wentges, testifies that he drew a whole row of drafts upon Schulte and Seven. "At the present time I do not remember a single case in which Terlinden or Kosbadt gave me an acceptance from

Schulte or Seven." Who placed the signatures upon the drafts he does not know. "At the end of March or the beginning of April, 1901, Terderlin told me personally that he should not draw on Schulte any more." (Rec., pp. 48-49.)

This shows that Terlinden complied with Schulte's request, made in March, 1901, not to draw on him any more.

This witness likewise testifies that he and Kosbadt signed the drafts in the name of the company. (Rec., p. 49.)

The witness Mueller testifies:

"The acceptances were on the drafts before I signed them. If they are forgeries, they were executed either by Terlinden, Miss Bath or Kosbadt. I cannot say who executed them. I also signed the letters with which they were sent to the bank. The drafts came in portfolios, sent by Miss Bath or Terlinden, and the portfolios were opened by Kosbadt, who had the key. Can't remember whether I was ever present when the portfolio was opened." (Rec., p. 52.)

This is all the material testimony in regard to the forged acceptance. They prove absolutely nothing against appellant, because:

First. All drafts were signed by Kosbadt or Mueller and clearly Terlinden never saw them.

Second. Both men had signed acceptances on blank drafts and honored them when presented and filled out.

Third. Granting the acceptance to be forgeries, no one even surmises that Terlinden did the work.

Fourth. When Schulte asked to have no more drafts drawn on him, Terlinden gave his book-keeper instructions not to draw on him again.

Fifth. Kosbadt admitted that he signed Seven's name to former drafts, which were honored, and did so without direction from Terlinden.

Sixth. Terlinden had absolutely nothing to do with this branch of the business, which was under the direct supervision of Kosbadt, Wentges and Mueller.

There is, therefore, not even any *ex parte* evidence whatever in regard to Terlinden's connection with these alleged forgeries and that branch of the case is out of the question.

c.

The alleged forged certificates of stock.

We have already argued that the allegations of the complaint did not show any forgery of certificates. The alleged forged stamp impression is not a forgery of the instruments themselves. But appellant's connection with the stamp transaction is not established at all. All the testimony on this point is given by the witness Ludwig Schulte, boss-painter. The witness is entirely unreliable and his testimony absolutely worthless. He claims to have prepared this counterfeit stamp under the direction and compulsion of appellant. (Rec., pp. 31, 32, 46, 47.)

The witness is incompetent to establish the forgery because, if his story is true, he is an accomplice and his testimony is worthless unless corroborated. He admits that he made the spurious stamp. Under the provisions of the German Criminal Code, Sec. 49 (Rec., p. 28), he could be punished as principal, being at least an aider or abettor.

In this connection a word on the question of presumptions. The accused is charged with forgery, etc., and specifically in the complaint with forging this stamp with intent to defraud, a specific intent. He certainly could make or order to be made, as many stamps of the kind described, unless he did so with "fraudulent intent." It is elementary, "when a specific intent is required to make an act an offense, that the doing of the act does not raise a presumption that it was done with specific intent."

Lawson on Presumptive Evd., 472.
People v. *Platt*, 100 N. Y., 592.

Hence the testimony of Schulte, standing alone, proves absolutely nothing. Uncorroborated in its essential elements, as it is, it cannot be considered.

The only attempt to prove the fact of forgery of the certificates by the accused, the *corpus delicti*, is the testimony of an accomplice. According to the elementary rule of evidence, the *corpus delicti* must be proven beyond a reasonable doubt and by the best evidenc .

Com. v. *York*, 9 Metc., 93.
People v. *Schriver*, 42 N. Y., 1.

Since the uncorroborated evidence of this accomplice would not be allowed to establish appellant's connection with the offense, how can it be held to establish the existence of the criminal act itself?

The *corpus delicti*, according to all authorities, can be proven only by direct evidence or circumstantial evidence of the most cogent and irresistible nature.

Best on Evid., Sec. 442.
3 Greenleaf on Evid., Sec. 30.

It cannot be proven by extra-judicial confession alone. It is likewise laid down that the testimony of an accomplice can only be considered as connecting the defendant with the crime.

Wharton Am. Crim. Law, Sec. 785.

This is true upon principle because if the *corpus delicti* could be established by the testimony of an accomplice, it would be tantamount to establishing the "body of the crime" by a confession.

According to the German Criminal Code, the witness Schulte was incompetent to testify at all. "Persons who with reference to the subject under inquiry are suspected as accomplice, accessory or aider or abettor, or have already been sentenced, are incompetent to testify."

German Procedure, Sec. 56, par. 3 (Rec., p. 29).

Why, nevertheless, he was permitted to testify can only be surmised. The whole procedure being *ex parte* and apparently tainted with an attempt to brand appellant as a criminal *par excellence*, is suspicious and repugnant to the American conception of a fair and impartial hearing.

Conclusion.

We have endeavored to demonstrate to your Honors that the District Court erred in declining to receive evidence affecting the legality of appellant's restraint; in declining to issue a writ of *certiorari* to bring up the record from the commissioner; in holding that the question of the existence of a treaty for the extradition of fugitives from the United States to Germany was a political question, and not a judicial one; in holding, in effect at least, that such treaty existed; and in holding that the records show the commission of an extraditable offense.

The question of the non-existence or existence of an extradition treaty between the United States and the German Empire is the most important one, no doubt. But we leave this case with your Honors, with this last suggestion,—whether a treaty exists or not,—how can a government, whose laws have been violated, demand the extradition of a fugitive under the contract of a state whose laws have not been violated?

Respectfully submitted.

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